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No. 598

In the Supreme Court of the United States

October Term, 1955.

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners,*

vs.

Aetna Life Insurance Company, a corporation, *Respondent.*

Respondent's Brief in Opposition to Petition for Certiorari.

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Aetna Life Insurance Company, a corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI*.

Introduction.

The action is one in the nature of interpleader, brought by Aetna Life Insurance Company. Aetna had issued an annuity contract to Rosa B. Wright Rettenmeyer. At her death certain of her heirs who were contingent beneficiaries under the annuity instituted conversion actions in the state courts claiming the funds that went to pay the premiums of the annuity. Certain other heirs who were beneficiaries under the annuities asserted claims to benefits under the annuities as contingent beneficiaries. Faced with claims for a refund of the premiums allegedly converted by the insurance company, and with claims asserting the validity of the annuity by two sets of conflicting heirs and beneficiaries plaintiff instituted the present action. The

trial court issued a temporary restraining order enjoining the prosecution of actions against Aetna pending determination of the interpleader action and until the further order of the court. After motion to dismiss was overruled and appeal time elapsed the court entered an order construing the order heretofore made specifically naming certain causes of action pending in the state court against the Aetna. From this order construing the order heretofore made appeal was lodged in the Court of Appeals of the Tenth Circuit, and this court affirmed the trial court (Opinion found Sup. Ct. Tr., p. 3). The present petition for certiorari seeks review of this decision.

Response.

Since the petition for a writ of certiorari filed in this matter fails to make clear the entire factual situation in connection with this litigation we are including in this brief a more detailed statement of the facts than appears in the petition for certiorari.

Outline of Facts.

We believe it would be helpful if we gave a chronological statement of the facts in this case as disclosed by the pleadings and feel in all sincerity that the facts as outlined in appellants' brief fails to give a complete picture of the case. The record discloses:

Rosa B. Wright was the widow of a wealthy Oklahoman named Cal Wright and inherited a considerable estate from him. He died in March of 1928.

Rosa B. Wright married Joseph A. Rettenmeyer in 1937 (Ct. of App., Tr. 13). Prior to her marriage an antenuptial contract was entered into in March of 1937 (Tr. 18).

The gist of this agreement was to the effect that neither Rosa B. Wright nor Joseph A. Rettenmeyer should have any claim on the property of the other. (References hereafter are to the Court of Appeals transcript unless otherwise specified.)

In July of 1946, Rosa B. Wright Rettenmeyer executed a will (Tr. 39). Its terms provided a $10,000.00 bequest to her friend Miss Grace Bartlett, then the remainder and residue of the testatrix's property, real and personal, went share and share alike to the following: Leona Denham Holcomb, a niece; Mary Jane Wright Hopkins, niece and adopted daughter; Frank T. Denham, a nephew; Edward Denham, a nephew; Clarence Denham, a nephew; George N. Denham, a nephew; Raymond Rettenmeyer, Forest Rettenmeyer and F. X. Rettenmeyer, sons of Joseph A. Rettenmeyer and nephews of Rosa by her previous marriage, and Joseph A. Rettenmeyer, her husband, and Donald George Fleming, sons of Leona Denham Holcomb. She nominated the law firm of Embry, Johnson, Crowe, Tolbert, and Shelton of Oklahoma City to be attorneys in the administration of the estate and nominated the First National Bank & Trust Company of Oklahoma City to be executor of the will.

In February of 1949 she suffered a stroke (Tr. 16).

On March 30, 1949, she executed a Power of Attorney to her husband, Joseph A. Rettenmeyer (Tr. 40).

A Second Power of Attorney to her husband was executed April 18, 1949 (Tr. 42).

On November 17, 1950, Rosa B. Wright Rettenmeyer signed an application for the purchase of an annuity contract No. AN33409 from Aetna Life Insurance Company, which is the subject of the interpleader action. It was is-

sued on the 9th of December, 1950. (Tr. 6, *et seq.*) The instrument recites it is a single premium contract and in consideration of payment of the premium of $162,606.00, the Aetna agreed to pay $1,000.00 a month to Rosa B. Wright Rettenmeyer during her lifetime. After the death of Rosa B. Wright Rettenmeyer it provided that each annuity payment of $1,000.00 a month should become payable to Joseph A. Rettenmeyer, husband of the annuitant if then living. That after the death of the survivor, Joseph A. Rettenmeyer, the $1,000.00 a month should be apportioned when due as follows:

$123.07	Ellen Cash, niece of the annuitant
$123.07	Rufus Denham, nephew
$123.07	Marion Denham, nephew
$123.08	Lewis Denham
$123.07	Marion Rettenmeyer (widow of Forest Rettenmeyer)
$123.08	Frank X. Rettenmeyer, nephew of the annuitant
$123.08	Raymond D. Rettenmeyer, nephew of the annuitant
$ 23.08	Frank T. Denham
$ 23.08	Edward Denham
$ 23.08	Clarence M. Denham
$ 23.08	George N. Denham
$ 23.08	Leona Denham Holcomb
$ 23.08	Mary Jane Hopkins

On November 22, 1950, she executed the first codicil to her will (Tr. 43). In this codicil she mentioned the gifts to the heirs mentioned in her will, namely the Denhams, Holcombs, and the Rettenmeyers, and mentioned that Forest Rettenmeyer had died, leaving Marion Rettenmeyer, his wid-

ow, and she wrote that she desired that Marion Rettenmeyer take the part of her estate which would have been taken by the nephew. A certain note of Harve Bateman and Rosa B. Bateman for $10,000.00 was cancelled and the rest of the will was confirmed.

On January 30, 1951, she executed a second codicil (Tr. 45), which confirmed the will as modified by the first codicil and added a remark that if anyone contested the will his or her share becomes a part of the residuary estate and goes to the other heirs.

Rosa received $1,000.00 a month begining in January, 1951, which payments continued on down to her death and then they were paid to Joseph A. Rettenmeyer, which payments continued on down to the date of his death. She died December 13, 1952; he died March 22, 1954. (Tr. 5)

Rosa B. Wright Rettenmeyer was adjudged incompetent by the County Court of Creek County on August 26, 1952, in Cause No. 6366. (Tr. 48) The Petition for Appointment of a Guardian was filed by Joseph A. Rettenmeyer (Tr. 47) through Embry, Johnson, Crowe, Tolbert & Boxley, his attorneys. The County Court appointed her husband, Joseph A. Rettenmeyer, guardian of her person, and appointed Guy L. Berry, a Sapulpa banker, guardian of her estate. At the time of the death of Joseph A. Rettenmeyer $39,000.00 has been returned under the annuity contract, either to Rosa or to Joseph under her power of attorney or to the guardian of Rosa or Joseph after her death.

Letters testamentary were issued in the County Court of Creek County in Case No. 6442 after her will and both of the foregoing codicils had been admitted to probate on January 12, 1953. (Tr. 39)

The First National Bank and Trust Company of Oklahoma City was appointed executor of her estate. The claims and attacks on the annuity contract and a companion annuity policy issued on the life of Donald George Fleming appear first to have been brought out in Case No. 6442 in the County Court of Creek County, which was the Rosa B. Wright Rettenmeyer will case. These attacks appear in the amendments to the Complaint in Intervention (Tr. 69, *et seq.*), and were asserted in a Complaint in Intervention filed by Leona Holcomb and the other above named defendants, Hopkins and Denhams. It was alleged that while Rosa was incompetent and mentally incapacitated, that Joseph A. Rettenmeyer procured from her funds an annuity contract from Aetna Life Insurance Company ostensibly to Donald George Fleming in the face amount of $33,000.00. It was further alleged that within a month after procuring this first annuity contract with her funds, Joseph A. Rettenmeyer secured another annuity contract from Aetna Life Insurance Co. in the face amount of $162,000.00.

In the Complaint in Intervention in the County Court case in the prayer for relief it was sought by the Denham heirs that the executor, First National Bank and Trust Company, be ordered to institute a suit to recover all omitted property belonging to the estate, including monies expended for annuity contracts. This definitely shows that the present group of Denham heirs, Holcomb, Hopkins and Fleming, who are plaintiffs in the State Court cases, are seeking to recover the monies expended for the annuity contracts and unquestionably show that the money went for the purchase of the annuity contracts.

At this point we should call the Court's attention to the fact that the Donald George Fleming annuity is the sub-

ject of another interpleader action, a companion suit to the present case, but not presently before the Court. Thereafter in the same probate case, Leona Holcomb and certain of the other defendants again attacked the validity of the annuity contract and the Donald George Fleming policy in an Amended Complaint in Intervention (Tr. 71). This amendment repeated the facts pertaining to the two contracts with Aetna and the Complaint in Intervention prayed among other things that the executor, First National Bank and Trust Company of Oklahoma City, immediately commence suit to recover the foregoing assets consisting of the monies that went to purchase the two contracts, which total approximately $190,000.00.

This proceeding was heard by the County Court of Creek County on October 22, 1953. Judgment was rendered in that court as appears from the Journal Entry of the Judgment of the County Court. (Tr. 22) Among other things the court found that Rosa B. Wright Rettenmeyer was fully competent to transact her affairs and was in possession of all of her mental faculties and fully competent to enter into contracts with Aetna Life Insurance Company with respect to Policy No. N1669203, October 27, 1950, on the life of Donald George Fleming, and with respect to a Life Insurance Policy or Annuity Contract No. AN33409 dated December 9, 1950. The court made a finding that it would be a useless waste of funds for the estate for the executor to file suit against F. E. Pence and the Aetna Life Insurance Co. and Joe Rettenmeyer to recover the funds of the deceased expended for the policies and that the executor should not add such items to the inventory of the estate and should not institute suit or expend funds of the estate to attempt to recover the same for the estate.

The court further found that the ante-nuptial contract had been destroyed. The court directed that neither the Donald George Fleming policy nor the funds of the decedent expended in the purchase of the Donald George Fleming policy be added to the inventory of her estate and made the same order as to Annuity Contract No. AN33409 or the funds or monies of the decedent expended in the purchase of that annuity contract.

This decision was appealed to the District Court of Creek County.

While the appeal was pending in the County Court case there was filed in the District Court of Creek County Case No. 29092 (Tr. 13). This was filed September 30, 1953. The plaintiffs were Leona Holcomb, Leona Holcomb, as guardian of Donald George Fleming, a minor, Ed Denham, Frank Denham, Clarence Denham, George Denham and Mary Jane Wright Hopkins. The suit was brought against Aetna Life Insurance Company, F. E. Pence (Aetna's agent), Joseph A. Rettenmeyer and the First National Bank and Trust Company, executor of the estate of Rosa B. Wright Rettenmeyer. An analysis of this suit shows that it is a damage suit against Aetna, Pence and Joe Rettenmeyer for wrongfully taking $162,606.00 from Rosa B. Wright Rettenmeyer when she was 80 years old and incompetent. It was a companion suit to a suit filed at the same time, being Suit No. 29114 in the District Court of Creek County. (See Discussion Supplemental, Tr. 22.)

In the Case No. 29114 it was sought by plaintiffs to recover the monies that went to purchase the $33,000.00 Donald George Fleming policy, approximately $25,000.00, and allegations are similar to those in the present suit No. 29092.

Continuing with 29092, an analysis of the petition sets forth the family relationship, the fact that Joe married the wealthy widow, it set out the ante-nuptial contract and then said that Joe set out to circumvent the will and ante-nuptial contract and take for himself and his kin the lion's share of the estate to the exclusion of the plaintiffs. It pleaded the execution of the will and then pleaded that the consent of the First National Bank and Trust Company as executor to recover the bonds and money wrongfully taken could not be obtained, so the bank as executor is joined as defendant. It was alleged that Joseph A. Rettenmeyer got Rosa to execute a power of attorney, and then she had a stroke, that she was totally incompetent, and then sets out that the defendants entered into a scheme to take the $162,606.00 and to accomplish this that Aetna, Pence and Joseph A. Rettenmeyer pursuaded her to liquidate U. S. Government bonds and place the proceeds in her bank account at Oklahoma City and thereafter they took and carried away the money, and as a cloak to legalize the plan and conceal it they placed the Annuity Contract No. AN33409 in and among her effects. The petition alleges that Joseph started getting the $1,000.00 a month, deposited it to Rosa's account and that he himself lived on it until her death in 1952, and that such part as was used for the benefit of Rosa was used without her knowledge or consent and for the purpose of concealing the plan and device from which her estate was taken from her. It prayed judgment for the $162,606.00 with interest against Aetna, Pence and Joseph A. Rettenmeyer.

An amended petition was filed in Case No. 29092 on April 7, 1954, and refiled April 15, 1954 (Tr. 31). Certain parties were added to this case. The plaintiffs were the same and the suit was against Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer then Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, the First National Bank and Trust Company of Oklahoma Ciy were added. Then there were certain bankers in Oklahoma City, employees of the First National Bank, namely Virgil F. Sprankle, Grove D. Strother, A. N. Murphy and Justin W. Faherty, added as defendants.

In the petition it is alleged that after identifying the defendants, that Joseph A. Rettenmeyer at all times was the agent, attorney in fact or guardian of Rosa B. Wright Rettenmeyer and in committing the tort complained of and in converting the property he acted for himself and as agent for his own children.

The petition sets out the identity of Aetna Life Insurance Co. and Pence and then mentions the size of Rosa's property, the intended marriage, the ante-nuptial contract, the will and the codicils, and then alleges that after executing the will and codicils she became incompetent. The petition alleges that the ante-nuptial contract, the wills and codicils were prepared by John Embry, her attorney, or his law firm, and that these attorneys were also attorneys for Pence, Aetna and Joseph A. Rettenmeyer.

The petition then sets forth that she owned certain United States Government bonds with a market value of $191,-864.64. The petition then alleges that the bonds would have been divided according to her will, that is, 1/11th to Joseph A. Rettenmeyer and 7/11ths to the plaintiffs, and that it was the duty of the defendants to preserve her property for

disposition conformable to the terms of her ante-nuptial contract, will and codicils, but then alleges that there was a breach of trust in that the defendants on October 31, 1950, secretly entered her lockbox in the First National Bank & Trust Company and without authority of law, took, stole and carried away the bonds and endorsed an "X" or caused an "X" to be endorsed, purporting to be the act of Rosa B. Wright Rettenmeyer and procured the cash value of $191,-864.64 and converted it to their own use. It will be observed that at this time the plaintiffs have added 29114, being the suit on the Donald George Fleming policy, Case No. 29092, and have now made Case No. 29092 a suit for conversion for the full amount of the bonds that went to purchase the two insurance contracts, and omitted any reference to annuities.

Plaintiffs asserted a claim under the appeal in the County Court case for a return of the monies that went to set up the two insurance contracts and in this present amendment to the complaint without mentioning the two contracts, they now seek to turn the case into a conversion suit for conversion of $191,864.64. It was alleged that Rosa B. Wright Rettenmeyer had no knowledge of the foregoing or that she was so dominated by the defendants that she was powerless to act in her behalf.

The petition then alleges that she died December 13, 1952, that the bank was appointed executor, and that it refused to sue for the recovery of the assets of the estate and increment or profit or any part thereof. And further that the plaintiffs were unable to discover the facts until less than one year prior to the date of filing the action. That the plaintiffs (although they had no present property right in the bonds) suffered damage in the sum of $191,864.64

with interest at $39,487.00, or a total of $231,351.94 plus punitive damages in the sum of $231,351.94.

Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same lawsuit was filed (Tr. 72).

On April 16, 1954, the present action resulting in this appeal was filed in the United States District Court for the Northern District of Oklahoma, being Case No. 3502 (Tr. 3). This was Complaint for Interpleader and was brought by Aetna Life Insurance Company against all the beneficiaries in the Policy No. AN33409.

The complaint shows that the plaintiff is a Connecticut corporation and that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of Donald George Fleming, a minor, and Donald George Fleming, a minor, Edward Denham, Frank T. Denham, George N. Denham, Leona Denham Holcomb, and Mary Jane Wright Hopkins are all citizens and residents of the State of Oklahoma. The defendant Raymond D. Rettenmeyer is a resident of the State of New York, Frank X. Rettenmeyer is a citizen of the State of New Jersey, Marion Rettenmeyer is a citizen of the State of Oregon, the defendant Lewis Denham is a resident of the State of Idaho, the defendant Marion Denham is a resident of the State of Washington, the defendant Rufus Denham is a resident of the State of Washington, and Ellen Cash is a resident of the State of Idaho. The complaint alleges diversity of citizenship, and that the amount in controversy exceeds the sum of $3,000.00.

The ante-nuptial contract is pleaded, the will is referred to, and various other facts are set forth in the complaint. The complaint alleges, after setting forth the admission of the will to probate with the codicils, that the Oklahoma Den-

hams, Mrs. Hopkins, Donald George Fleming and Leona Holcomb, filed Case No. 29092 against Aetna, attacking the validity of the annuity contract and seeking to recover the premium paid of $162,606.00 for the estate of Rosa B. Wright Rettenmeyer. The complaint then sets out the order of the County Court of October 22, 1953, holding that Rosa was competent and instructing that no suit against Aetna be filed. It alleges then that Joseph A. Rettenmeyer died on the 22nd of March, 1954. It alleges that the beneficiaries named in the annuity contract who were not parties to Case No. 29092, namely the Rettenmeyers, Lewis Denham, Marion Denham, Rufus Denham and Ellen Cash are claiming to be entitled to monthly payments provided in the annuity contract.

Thereafter the amended petition filed in Case No. 29092 is referred to. It is then alleged that the Denhams, Leona Holcomb and Mary Jane Hopkins by reason of their petition are seeking to have the single premium payment of $162,-606.00 paid back by Aetna to the estate of Rosa B. Wright Rettenmeyer and that by reason of these conflicting claims the plaintiff alleges that a conflict has arisen as to which of the defendants are entitled to payments of their respective claims and the plaintiff has been and may be subjected to vexatious and multitudinous lawsuits and further subjected to multiple payments in the event all of the defendants should prevail.

Then plaintiff sets forth that it has filed a bond with good and sufficient surety, the record shows the bond was approved by the court; then it prays that each defendant be restrained from instituting any action against the plaintiff or from prosecuting any pending action or actions against the plaintiff for recovery of the policy's proceeds, or any

part thereof, until the further order of the court and that the defendants be required to interplead and settle between themselves their rights.

At the same time on April 16, 1954, there was issued (Tr. 49) an Order for Issuance of Process and an Injunction against Interpleaded Claimants, and after reciting the facts, including the fact that the Denhams, Hopkins, and Holcomb are claiming a return of the premium and that the defendants, Cash, Rettenmeyer and the remaining Denhams claim to be entitled to payments of the contract, and it further appearing that the plaintiff Aetna has deposited its bond, it was ordered that the clerk issue process for the defendants, and it was further ordered,

> "that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of the person and estate of Donald George Fleming, and all the remaining defendants, be, and they are hereby enjoined and restrained from instituting any suit in any state court or are restrained from prosecuting further any suit pending in any state court, and further they are enjoined and restrained from instituting or prosecuting in any United States Court any suit or proceeding on account of or pertaining to policy No. AN33409 issued by Aetna Life Insurance Company to Rosa B. Wright Rettenmeyer, reserving unto them however the right to appear in this suit and assert their claim which they may have, if any."

The record shows that personal service was had in the districts where each defendant lived and there is no question raised as to the validity of service of process or service of the temporary injunction. The defendants, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Den-

ham, Frank X. Rettenmeyer and Raymond D. Rettenmeyer filed an answer (Tr. 56) in which they claimed the benefits under the annuity contract.

The defendants, Leona Holcomb, Hopkins, Fleming and the Oklahoma Denhams filed a Motion to Strike Certain Portions of the Complaint (Tr. 57), a Motion to Dismiss Complaint for Interpleader, Vacate Order for Issuance of Process and Injunction against Interpleaded Claimants and Response to Application of Plaintiff (Tr. 59). In this motion it is stated by the movants that they are not adverse claimants to the remaining defendants under the provisions of the Interpleader Act, for that their claim is for willful tort against the plaintiff in converting the United States bonds and entitle the movants and the estate of Rosa B. Wright Rettenmeyer to statutory damages, whereas the claims of the remaining defendants in this action are for payment provided for them by the contract.

It is further stated in the motion, regarding Aetna's liability, that "Its obligation to make contractual monthly payments is plaintiff's alone, and in no wise related or connected to the tort complained of." Other grounds are raised in the motion, which speaks for itself. The defendant Ellen Cash, represented by the Youngs, filed a Motion to Strike, a Motion to Vacate the Injunction, and then an Answer (Tr. 63). The Motion to Vacate the Injunction states that she is entitled to sue on the contract of insurance in Idaho and in her answer she states that she is entitled to the monthly payments and that the plaintiff is obligated to pay $123.07 a month for which she seeks judgment.

On June 23, 1954, the plaintiff filed an Amendment to its Complaint for Interpleader (Tr. 69) in which the plaintiff alleged that the Annuity Contract was purchased by Rosa B.

Wright Rettenmeyer with the proceeds of the U. S. Government bonds mentioned in the amended petition filed by Leona Holcomb in Case No. 29092 and that Rosa B. Wright Rettenmeyer signed the application for insurance and was competent when she signed the application and that she specified the terms and provisions of the annuity contract and thereafter ratified the contract by accepting the annuity payments during her lifetime and prior to the date that she was adjudged incompetent on August 26, 1952 (Tr. 42). That after she was adjudged incompetent, payments were made to the guardian of her estate, and on her death payments were made to Joseph A. Rettenmeyer, the sum total of which amounts to $39,000.00.

Then the complaint further alleges that the Denhams, Holcomb, Hopkins and Fleming parties have attacked the validity of the annuity contract, not only in the manner alleged in the Complaint in Interpleader, but also in Case No. 6442 in the County Court of Creek County in which is pleaded the contention that the purchase of the Donald George Fleming Annuity and the purchase of the large annuity were procured while she was incapacitated and that it was sought in the County Court proceedings to require the executor to institute suits to recover the money that went to purchase the two annuity contracts.

It is then shown in the amendment to the complaint (Tr. 71) that an amended complaint in the County Court was filed wherein the same attack was made on the validity of the annuity contract and the validity of the Donald George Fleming annuity. It was then alleged that Leona Holcomb and the Denhams and others in the same situation again attacked the validity of the annuity contract in Case No. 87402 in the District Court of Tulsa County, styled

Mary Jane Hopkins, et al., *vs.* Aetna Life Insurance Co. To this amended complaint the Holcomb, Denham, Hopkins and Fleming interests filed amendments to their various motions and a supplemental motion to dismiss (Tr. 72).

The record shows that on the 17th day of September, 1954, the court entered an order overruling the motion to strike and overruling the motion to dismiss the complaint. This order after reciting appearances (Tr. 76) is as follows:

> "* * * and the court having heard argument of counsel and being fully advised finds that the motion to dismiss the complaint for interpleader should be overruled, that the motion to strike and amended motion to strike should be overruled, the motion to vacate the order for issuance of process and the motion to vacate the injunction should be overruled as to the order for issuance of process and overruled in part and sustained in part as to the motion to vacate the injunction in that the motion should be overruled as far as it affects Aetna Life Insurance Company and sustained in so far as it affects the remaining defendants. The special appearance and motion to suppress the depositions and subpoenas for the depositions should be overruled.
>
> "It Is Therefore Ordered, Adjudged and Decreed that the various motions be overruled, and sustained as hereinbefore set forth and the temporary restraining order heretofore issued on April 16, 1954, is hereby vacated in so far as the same enjoins or restrains any judicial proceedings or actions of any kind or character against any person, firm or corporation except the plaintiff, Aetna Life Insurance Company, and in so far as said injunctions and restraining order restrains and enjoins the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company, said injunction and restraining order is continued in full force and *effect pending the determination of this*

action and the further order of the court. Royce H. Savage, Judge." (Italics ours.)

The court therefore overruled the motion of the defendants to dissolve the injunction in so far as it affected Aetna Life Insurance Co. This order was filed October 4, 1954, and at that point certainly was an appealable order. An appeal was not taken within time from the order of the court on that proceeding.

We then come to the order from which the appeal was taken to the Court of Appeals, which was entered on November 12, 1954:

"Now, on this 12th day of November, 1954, it appearing that some confusion has arisen pertaining to the restraining orders of the court heretofore made and entered on the 16th day of April, 1954, and the order thereafter on the 17th day of September, 1954, on verbal application of the plaintiff Aetna Life Insurance Company, and in order to construe the order heretofore made and clarify said order,

"It Is Ordered, Adjudged and Decreed, that the defendants, Leona Holcomb, individually, Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, Edward Denham, Clarence M. Denham, George N. Denham, Leona Denham Holcomb, Mary Jane Hopkins, Ellen Cash, Marion Rettenmeyer, Rufus Denham, Marion Denham, Lewis Denham, Frank X. Rettenmeyer and Raymond D. Rettenmeyer, be and they are hereby enjoined, and restrained from instituting any suit in any State Court, or are restrained from prosecuting any suit pending in any State Court and further, they are enjoined and restrained from instituting or prosecuting in any United States Court, any suit or proceeding on account of or pertaining to Policy No. AN33409 issued by Aetna Life Insurance Company to Rosa B. Wright Rettenmeyer,

reserving unto them, however, the right to appear in this suit and assert their claims which they may have if any and that this injunction and restraining order only restrains any judicial proceedings against the Aetna Life Insurance Company by said defendants and enjoins and restrains the prosecution of any suits or causes of action against the plaintiff, Aetna Life Insurance Company, including particularly Cause No. 29092 in the District Court of Creek County, State of Oklahoma, styled Leona Holcomb, et al., *vs.* Aetna Life Insurance Company, et al., and Cause No. 87402 in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, et al., *vs.* Aetna Life Insurance Company, et al., * * *"

This order came about as a result of certain remarks counsel for the appellants made in an argument on motions filed by the First National Bank and Trust Company for leave to intervene as well as Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty, employees of the bank. See Supplemental Tr., pages 1-4. F. E. Pence had also filed a motion for leave to intervene (page 5) and F. X. Rettenmeyer as executor of the estate of Joseph A. Rettenmeyer had filed a motion for leave to intervene. The status of the case at that point was the court was hearing arguments on the motions for intervention and at a certain point in the argument, which took place on November 12, 1954, after the appeal time on the order overruling motion to dismiss and the order continuing the injunction in force as to Aetna Life Insurance Company, one of the counsel for the appellants made the following remark which precipitated this present appeal. He said (S. Tr. 26):

"* * * We have examined, since this last hearing, with a little bit more care the exact order Your Honor issued. We were under the impression previously that

> Your Honor's order attempted to enjoin prosecution of that case in the state court. We have found the order does not so indicate, and we think, properly so."

At that point counsel for Aetna said as follows:

> "I take it from counsel's statement a moment ago in his argument that he takes the position that the plaintiffs, the Denhams, are not now restrained from proceeding against Aetna in the District Court case—I gathered that from his remarks."

These statements by Mr. Young and Mr. Woolsey precipitated the colloquy between the court, Mr. Young and Mr. Woolsey (Tr. 80), and the court said:

> "That was the order that I intended to make.",

and the court further said:

> "I am construing the order heretofore made."

It is from that order that the appeal was lodged in the Court of Appeals.

The Court of Appeals for the Tenth Circuit affirmed the decision of the trial judge. See Opinion (Sup. Ct. Tr., p. 3, *et seq.*, or Petition for Certiorari, p. 21, *et seq.*).

The Opinion as written clearly states the views and reasons of the Court of Appeals and need not be here reemphasized.

The Petition for Certiorari seeks to invoke the jurisdiction of this Court for several reasons: *First*, because of an alleged unwarranted interference by a federal district judge with lawful jurisdiction of the state court; *second*, because the Court of Appeals of the Tenth Circuit has so far sanctioned a departure from the accepted and usual course of proceedings by a lower court as to warrant exercise of the Supreme Court's power of supervision; *third*, it has decided a federal question in conflict with the applicable

statutes of the United States, and controlling Rules of Federal Procedure; *fourth,* it has decided an important question of federal law contrary to the conclusions of other courts but which has not been and should be settled by this Court.

I.

The Court of Appeals Properly Construed 28 U. S. C. A. 1335, 1397, and 2361.

Congress in 1948 provided for injunctions in actions in interpleader and in the nature of interpleader.

28 U. S. C. A., Sec. 2361, is as follows:

"In any civil action of interpleader or in the nature of interpleader under Section 1335 of this title, a District Court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any state or United States Court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such District Court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970; amended May 24, 1949, c. 139, Sec. 117, 63 Stat. 105."

The rights of the plaintiff to bring the action of interpleader are determinable in the light of Title 28, U. S. C. A., Sec. 1335, which is quoted in its entirety:

"(a) The District Courts shall have original ju-

risdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

"(1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931."

The venue of this action lies in the Northern District of Oklahoma. See U. S. C. A., Title 28, Sec. 1397:

"Any civil action of interpleader or in the nature of interpleader under Section 1335 of this title may be

brought in the judicial district in which one or more of the claimants reside. June 25, 1948, c. 464, Stat. 936."

The action that we have brought is an action in the nature of interpleader and it may be brought even though the plaintiff has an interest in the subject matter and is not a disinterested party. See the discussion in Vol. 6, Cyclopedia of Fed. Proc., Sec. 2203, as follows:

"* * * Although a pure bill of interpleader lies only on behalf of one who stands indifferent between conflicting claimants, claiming no interest in the subject-matter, disinterestedness is not necessary to a bill in the nature of interpleader, and if there are other equities to support the suit it may be entertained as one in the nature of interpleader and relief administered therein."

A case in point and quite like our case at bar is the case of *Equitable Life Assurance Society of the United States* v. *Maloney*, 85 F. Supp. 212 (U. S. Dist. Ct., Eastern Dist. of Mo.). This case is interesting as it is one of the first cases decided following the Interpleader Act of 1948. Syllabus 2 is as follows:

"Where complainant has an interest in outcome of proceeding and there are conflicting claims for fund held by complainant and complainant has some right to equitable relief with respect to the fund, the complainant may proceed by a bill in the nature of interpleader."

Syllabus 3:

"Where annuitant's administrator brought action against insurer and beneficiary charging that all annuity contracts were purchased by annuitant when she was advanced in age and of sick and feeble mind, defendant beneficiary practiced fraud and undue influence to obtain property of annuitant through instrumental-

ities of annuities action only assailed annuity contract in which such defendant was beneficiary but nature of charges were such that insurer might be confronted with conflicting claims as to other annuity contracts, the insurer had right to equitable relief as between non-resident claimants and resident administrator and could maintain a bill in nature of interpleader. 28 USCA, Sec. 1335."

An examination of the opinion discloses that the facts are almost on all-fours with the present facts. The annuitant in the *Equitable* case was an elderly lady past 80; she had purchased 25 annuity contracts from the plaintiff insurance company. Her administrator filed a suit in the State Court seeking to secure all the money paid the insurance company for the issuance of the annuity contracts on the theory she was aged and incompetent. Certain of her heirs and beneficiaries under her annuity contracts were about to claim the benefits under the policy and the insurance company filed an interpleader action. The court in its opinion answers nearly all the contentions of the present appellants. See page 215:

> "* * * but was an action to secure all the money paid the Assurance Society for the issuance of the annuity contract. It follows plaintiff Assurance Society had an interest in the State Court proceeding other than that of a mere stakeholder. * * *
>
> "If the complainant has an interest in the outcome of the proceeding and there shall be conflicting claims for the fund held by the complainant, and the complainant shall have some right to equitable relief with respect to the fund, complainant then may proceed by 'a bill in the nature of interpleader.' Prior to the 1948 revision, under such conditions, it was held, where plaintiff sought to present his case by 'strict bill of interpleader'

that it was 'clearly sufficient as a bill in the nature of interpleader,' if jurisdictional facts are established. *Hunter* v. *Federal Life Ins. Co.*, (8th Cir.) 111 F. 2d 551, loc. cit. 556. See also, *Klaber* v. *Maryland Casualty Co.*, (8th Cir.) 69 F. 2d 934, loc. cit. 940, 106 A. L. R. 617. We think the 1948 revision has further liberalized interpleader action. The amendment inserted, with respect to adverse claimants, not only those who 'are claiming' but added those who 'may claim' to be entitled to share in the fund."

The *Equitable Life Assurance* case cites several cases which are long established and are authorities in support of our position that interpleader is the proper action even though plaintiff has some interest in the matter and is denying certain of the claims and contesting them. See *Standard Surety & Casualty Company of New York* v. *Baker, et al.*, (8th Cir., 1939) 105 F. 2d 578, syllabus 1:

"'Interpleader' is an equitable remedy available in federal courts."

(Syllabus 3:) "The fact that plaintiff has some personal interest in subject matter does not preclude plaintiff from maintaining a bill in the nature of interpleader. Jud. Code, Sec. 24(26), as amended Jan. 20, 1936, 28 U. S. C. A. Sec. 41(26); Rules of Civil Procedure for District Courts, Rule 22, 28 U. S. C. A. following Section 723c."

Hunter v. *Federal Life Insurance Co.*, (8th Cir., 1940) 111 F. 2d 551, syllabus 4:

"The jurisdiction of a federal court to entertain a bill of interpleader is not dependent upon the merits of the claims of the defendants."

(Syllabus 5:) "A stakeholder, acting in good faith, may maintain a suit in interpleader for purpose of rid-

ding himself of vexation and expense of resisting adverse claims, though he believes that only one of them is meritorious."

In an action for interpleader temporary injunction or restraining order may be granted. In this case we endeavored to follow the process and procedure set up in Title 28, U. S. C. A., Sec. 2361. (See *supra*, p. 21.)

The right of the plaintiff to have an action for interpleader based on Section 1335 should be considered in view of Rule 22 of the Rules of Civil Procedure. Rule 22 (Title 28, U. S. C. A., page 77) provides:

"(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C. A., Secs. 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, effective October 20, 1949."

The preliminary injunction granted was in effect a temporary restraining order. It was granted on the verified

complaint of the plaintiff. The amendment to the complaint related back to the original complaint (FRCP, Rule 15 (c)). So therefore the contention that the pleading was unverified is without foundation.

A study of the record shows that the contention that the trial court issued its order without reciting its reasons or without a showing of irreparable injury is without merit. The complaint shows that irreparable injury that plaintiff would sustain if it was not granted the relief sought and the Order for issuance of process and Injunction issued recited clearly the findings of facts and reasons for its issuance. (See Tr., p. 49, and Order overruling motion to dismiss complaint and vacate the injunction. Tr., pp. 76, 77.)

II.

The Court of Appeals Did Not Disregard Provisions of 28 U. S. C. A. 2283, and F. R. C. P. 22 and 65.

One of the points that counsel make in their petition for certiorari is that the restraining order was issued without notice. Although Rule 65 of the Rules of Civil Procedure provide that no preliminary injunction shall be issued without notice to the adverse party, there is no provision in the chapter on Interpleader, Title 28, Sec. 2361, providing for notice. In fact, if notice were required in interpleader actions, particularly where one of the defendants or claimants lives across the United States from the plaintiff, if he were served with a notice that a restraining notice was about to be requested, by the time the restraining order was heard, the very suit that injunction seeks to prevent would be filed in some far court and the purpose of the Interpleader Statute would be defeated. The Rules provide further that they do not affect or modify the Statutes of the United States,

pertaining to preliminary injunctions in actions of interpleader or in the nature of interpleader. See Rule 65e as follows:

> "These rules do not modify any Statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C. A., 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; * * *"

It is said in Cyclopedia of Federal Procedure, Third Edition, Vol. 6, Sec. 22.54:

> "Similarly, the present Act (Interpleader) provides that the District Court may enter its order restraining claimants from instituting or prosecuting any proceeding in any state or federal court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * * In order to avoid the possibility of interference with the full working of the Interpleader Act, Rule 65(e) provides that the Rules of Civil Procedure do not modify the provisions of 28 USC 2361, relating to preliminary injunctions in actions of interpleader."

III.

An Injunction Bond as Required by Rule 65 Was Unnecessary; The Bond Filed Was Sufficient.

The language of the interpleader act itself, Title 28, Sec. 1335, gives jurisdiction in interpleader actions if the first requirements are met, and if—

> "2—the plaintiff has deposited such money or property or has paid the amount of, or the loan, or other value of such instruments, or the amount due under such obligation into the registry of the court there to abide the

judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy."

The record at page 50 shows "an approved bond in the sum of $25,000.00 was filed April 16, 1954."

This question of the amount of the bond was raised by appellants in their motion to dismiss. (Tr. 59) This motion was overruled by the trial court and no timely appeal taken therefrom.

IV.

The Interpleader Statutes and Rules Do Authorize Federal Courts to Enjoin Prosecution of Tort or Other Actions for Damages Pending in State Courts.

The language authorizing such action is found in the statute. 28 U. S. C. A., Sec. 2361, says:

> "In any civil action of interpleader or in the nature of interpleader * * * a District Court may issue its process for all claimants and enter its order restraining them from instituting *any* proceeding in any state or United States Court affecting the property, instrument or obligation involved in the interpleader action until further order of the court."

It cannot be successfully argued that a tort action in which recovery is sought of funds or bonds that went to purchase an annuity contract does not affect the obligation of the annuity. If the claimants are successful in their conversion action and recover the funds that created the annuity, they cannot have the benefits of the annuity. Such

an action and the remedy of restraint of the existing actions of whatever kind are within the purview of the Interpleader Statute.

V.

The Present Case Is Not Such a Case as Under the Rules in Its Present Status Justifies *Certiorari.*

Rule 19 of this Court is as follows:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character or reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial questions in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A study of the brief fails to reveal any citations to show that the present case is brought within the scope of the above rule.

Conclusion.

The case presented by petitioners does not reveal a situation of special circumstances that justify the granting of the writ in view of the rules of this Court and the long-standing rulings that certiorari is granted only in special circumstances and only in cases of peculiar gravity and general importance. For these and the foregoing reasons it is respectfully urged that the judgment of the United States Court of Appeals for the Tenth Circuit is eminently correct and the application for a writ of certiorari should be denied.

Respectfully submitted,

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